No. 15,142

IN THE

United States Court of Appeals

For the Ninth Circuit

LEETA A. LLOYD,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COMPANY, a Corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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JURISDICTIONAL STATEMENT.

The Complaint (TR 3-5) filed in this action in the District Court seeks recovery of benefits provided by a Policy of Life Insurance in the amount of $12,400.00 issued by Appellee to Warren William Lloyd. Appellant is the beneficiary named therein.

The Answer (TR 6-7), denying certain allegations of the Complaint, sets up three defenses, the third being that the insured died by self-destruction within two years of the date of issue of the policy.

The jurisdiction of the District Court was invoked under 28 USCA Section 1332, appellant being a citizen of the State of California and appellee being a corporation organized and incorporated under the laws of the State of Illinois.

The jurisdiction of this Court is invoked under 28 USCA Sections 1291 and 1294(1).

STATEMENT OF THE CASE.

The insured, under the policy in question, made written application to appellee (TR 34-48) at San Jose, State of California, on the 6th day of December, 1952 for a life insurance policy in the amount of $13,000.00. (TR 35.) He was solicited by appellee's agent, Jack O'Neil. (TR pp. 48, 69.) At that time he executed and delivered to said agent a promissory note for $12.57 (TR pp. 46, 95, 69) which represented one full month's premium. (TR pp. 69, 93, 94—see also Exhibit A at p. 76, column heading "monthly".) The receipt attached to the application (TR pp. 50, 51), required by appellee to be given when "settlement toward first premium is collected at time of application" (Exhibit B, TR pp. 65-67), provided that "the insurance shall be effective in accordance with the provisions of the policy applied for *from the date* of this application or the date *of the medical examination,* if a medical examination was required, whichever is the later." (Italics used for emphasis—TR 66.)

The date of the medical examination of Lloyd was *December 11, 1952.*

A policy of life insurance bearing number 1127042 (TR pp. 8-49) was thereafter delivered to the insured Warren William Lloyd "sometime after January 5, 1953." (Appellee's Reply to Request to Admit, par.

5, TR 60.) It provides for payment to insured's beneficiary, the appellant, the "double benefit" of $3,000 "if Insured shall die before the end of the policy year on which the Insured's age nearest birthday is 65 years" *plus* an amount calculated pursuant to the table (TR 32) under the provisions "for Additional Insurance Adapted to Mortgage Redemption Purposes". (TR 31.) The effective date of the first policy year was December 11, 1952, the date of the medical examination of insured; the third policy year began December 11, 1954. Death of the insured occurred on December 21, 1954, which is in the *third* policy year. Therefore, using the table (TR 32) for Additional Insurance, appellee became obligated to pay appellant beneficiary, in addition to the "Double Benefit" of $3,000 provided in the policy (TR 8) ten times $940 or $9,400, making the total of $12,400, plus interest. (TR pp. 31-32.)

Insured was born March 14, 1920 or May 14, 1920. (TR pp. 35, 40.) At his death on December 21, 1954, he was under the age 65 nearest birthday to the end of that policy year; he was aged 34.

The policy in question which was issued and delivered to the insured contains "Incontestability" and "Suicide" clauses. (TR 11.) The latter clause is invoked by appellee in defense of its obligation to pay appellant, the beneficiary thereunder, any more than "the amount of premiums paid" on the policy.

But for applicant's request in the application, viz: "Date Policy Jan. 1, 1953" (TR 46), appellee admits that the effective date of the policy would have been

December 11, 1952 and that the two year suicide period would have expired December 11, 1954. (TR 54.) As hereinbefore stated, the date of the medical examination of the applicant was December 11, 1952.

The policy provides (TR 9):

> "Consideration: This insurance is granted in consideration of the *application* herefor and of the payment in advance of the premiums as herein provided. * * *"

It is appellant's contention that the insurance coverage provided by said policy was in force and effect from the date of the medical examination of applicant-insured, to-wit: December 11, 1952, and that death of the insured, having occurred more than two years thereafter, the suicide clause of the policy is not applicable.

QUESTIONS INVOLVED.

1. Was the insured without "interim coverage" between the date of the medical examination, December 11, 1952, for which he paid by delivery of note in the amount of $12.57 representing a full month's premium, and the date of the policy?

2. Did his request in the application for insurance "Date policy Jan. 1, 1953" defer commencement of the risk to Jan. 1, 1953, when, at the same moment the application was signed, he executed and delivered his note for a full month's premium, receipt of which is acknowledged in the application attached to the policy and receipt for which was given to insured?

3. May a life insurer escape its just obligation to a beneficiary under a policy which incorporates provisions of an application that constitutes, in effect, interim coverage antedating the policy and for which a premium was paid?

SPECIFICATION OF ERRORS.

1. The District Court erred in assuming that insured's request to date the policy Jan. 1, 1953 eliminated any issue as to a material fact.

2. The District Court erred in denying appellant's motion for summary judgment.

3. The District Court erred in granting appellee's motion for summary judgment.

ARGUMENT—POINTS AND AUTHORITIES.

I.

PAYMENT OF PREMIUM AT TIME OF APPLICATION.

A promissory note for $12.57 was given by applicant-insured to appellee's agent, O'Neil, in payment of a full month's premium at the time the application for the insurance in question was made (TR pp. 93, 95) on December 6, 1952. (TR 48.)

Acknowledgment of such payment of premium is contained in the application, made part of the policy of life insurance thereafter issued to Lloyd. (TR 46, par. reading: "There has been delivered to the agent the sum of $12.57 in notes, on account of the first premium.")

II.

RECEIPT FOR PAYMENT OF FIRST MONTH'S PREMIUM.

A receipt (see Exhibit B, TR pp. 65-67, at 66) was given for the first month's premium payment on December 6, 1952. Whether it bore the same (printed) number as the application or was one detached from an identical application form, the agent O'Neil testified he "couldn't swear definitely that it was" but that it was his "usual procedure to give a receipt * * * I must have given him a receipt." (TR 91.) In addition thereto appellee has conceded, for the purposes of the motion (summary judgment) "that the receipt attached to the application or a receipt substantially similar in form was given to the insured." (TR 64.)

But whether the identical form of receipt attached to the application, a form similar in content thereto, or whether any receipt was actually given, acknowledgment of payment of the $12.57 representing a full month's premium was made in the application which, upon issuance of the policy of insurance, was attached to and became a part of the policy. (TR 46.) Furthermore, appellant cannot be deprived of rights under the policy by the failure of appellee's agent to give the receipt to the applicant, Lloyd.

Section 384 of the California Insurance Code provides:

> "An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the payment is actually paid."

III

APPLICANT LLOYD WAS ENTITLED TO THE RECEIPT GIVING INTERIM COVERAGE.

Under the terms and provisions of the Receipt attached to the application "or a receipt substantially similar" (TR 64, 91) Lloyd was entitled to interim coverage from the date of medical examination, to-wit: December 11, 1952. In the case of *Ransom v. Penn Mutual Life Ins. Co.,* 43 Cal. 2d 420, 426, 274 Pac. 2d 633, the Supreme Court declared:

> "There is no merit in defendant's contention that it is not bound by the contract because its agent, in acknowledging payment of the premium, failed to use the receipt form attached to the application."

See also:

Gaunt v. John Hancock Life Ins. Co. (2d CCA), 160 F. 2d 599;

Griffith v. New York Life Ins. Co., 101 Cal. 627, 636;

Harrigan v. Home Life Ins. Co., 128 Cal. 531, 541, et seq.;

Hart v. Travelers Ins. Co., 258 NYS 711, 716, affm'd (1933) NY Ct. Appeals, 185 N.E. 739;

Jones v. International Indemnity Co., 39 Cal. App. 706, 709;

Masson v. New England Mutual Life Ins. Co., 85 Cal. App. 633, 639;

New York Life Ins. Co. v. Abromietes, 236 N.W. 769, 254 Mich. 622;

Vierre v. New York Life Ins. Co., 119 Cal. App. 352, 359, 360.

The receipt provided (TR 66):

> "* * * First: It is agreed that (1) if the entire first premium * * * is paid to an authorized agent of the Company at the time of making this application and (2) if the Company shall be satisfied after investigation and medical examination, * * * that the proposed insured was * * * an acceptable risk for the amount of insurance * * * the insurance shall be effective in accordance with the provisions of the policy applied for from the date of * * * the medical examination * * *."

The receipt given to insured provided, in effect, for coverage commencing on the date of the medical examination, December 11, 1952. It constituted interim coverage and became a part of the policy of insurance subsequently issued and delivered to insured.

Ransom v. Penn Mutual Life Ins. Co., supra.

It was an effective cover note and became merged with the policy.

Narver v. Calif. State Life Ins. Co., 211 Cal. 176, 180, 294 Pac. 393.

Section 382 of the California Insurance Code provides that the policy subsequently to be issued shall include within its terms the identical insurance bound under the cover note (receipt). Lloyd was entitled to the interim coverage provided thereby.

Stanley v. Columbia Casualty Co., 63 Cal. App. 2d 724, 732, 147 Pac. 2d 627.

California statutory provisions on the subject are deemed to be in contemplation of the parties as part of the insurance contract.

Malmgren v. Southwestern Ins. Co., 201 Cal. 29, 33.

The statutory provision being part of the contract of insurance, any uncertainties or conflicts that may arise must be resolved in favor of the insured or his beneficiary.

Pig. v. International Indemnity Co., 86 Cal. App. 671, 673.

"The laws of the State of California entered into and became a part of the contract of insurance. *Walker v. Whitehead,* 16 Wall. (83 U.S.) 314, 21 L.Ed. 357. * * *"

Aetna Life Ins. Co. v. Geher (9th CCA), 50 F. 2d 657, 658.

IV.

THE APPLICATION, COVER NOTE (RECEIPT), MEDICAL EXAMINATION REPORT AND POLICY CONSTITUTE THE INSURANCE CONTRACT.

The cover note (receipt) initiated life insurance coverage which commenced with the medical examination of Lloyd on December 11, 1952.

Narver v. Cal. State Life Ins. Co., supra;
Ransom v. Penn Mutual Life Ins. Co., supra.

The policy issued to Lloyd provides:

"This policy and the application therefor, a copy of which is hereto attached and made a part hereof, constitute the entire contract between the parties." (TR 14.)

The cover note (receipt) was attached to the application *when made* (TR pp. 88, 91, 55, 64), and became part of the policy or contract of insurance.

V.

REQUEST IN APPLICATION TO "DATE POLICY JAN. 1, 1953".

The request of applicant to date the policy "Jan. 1, 1953" is clearly compatible with interim coverage provided by payment of $12.57 for one full month's premium, and must be reconciled with such request in favor of the insurance coverage commencement as of December 11, 1952. The two dates are consistent with the logical assumption that Lloyd wanted the insurance coverage to commence immediately he passed the physical examination given by appellee company's own doctor and that appellee required payment ($12.57) for that interim coverage till the policy was actually delivered to him. The reasonable construction of his request for dating the policy nearly a month later than his application is that he wanted time to decide whether he would start the regular premium paying period on a monthly, quarterly, semi-annual or annual basis. Support for this construction is found in the fact that when the policy was finally delivered to Lloyd "some time after January 5, 1953," it provided for an annual premium of $136.63 (TR 8), yet he commenced paying and continued paying the premium on a *quarterly* basis. (TR 74, 76.) No other reasonable or logical explanation can be given for the request and for the acceptance by appellee's agent of the first month's premium on December 6, 1952. Settled law requires the reconciliation to be made in order that life insurance coverage commence at the earliest date a reasonable construction of the contract will permit.

"Where two interpretations equally fair may be made, that which affords the greatest measure of protection to the assured will prevail."

Fageol T. & C. Co. v. Pacific Indemnity Co., 18 Cal. 2d 731, 747;

Pendell v. Westland Life Ins. Co., 95 Cal. App. 2d 766, 769.

"To that end the law makes every rational intendment in order to give full protection to the interests of the insured. Glickman v. New York Life Ins. Co., 16 Cal.2d 626, 635; 107 Pac.2d 252; 131 A.L.R. 1292."

Pendell v. Westland Life Ins. Co., supra, p. 770, 771.

See also:

Ritchie v. Anchor Casualty Co., 135 Cal. App. 2d 245, 257, 286 P. 2d 1000, 1007;

Narver v. Calif. State Life Ins. Co., supra;

Ransom v. Penn Mutual Life Ins. Co., supra.

VI.

LAW REQUIRES INSURANCE COVERAGE FROM DATE OF MEDICAL EXAMINATION.

It is the policy of the law (especially in California —*Ransom v. Penn Mutual Life Ins. Co., supra,* and *Narver v. Calif. State Life Ins. Co., supra*) to regard the contract of life insurance binding immediately the application is made, except where medical examina-

tion is required, subject only to later rejection, thus preventing the company from reserving the option to treat itself as debtor according to a judgment exercised with wisdom born of the event. And it is not unfair to make the insurer bear the risk as the receipt of the initial premium benefits the insurance company by discouraging a change of mind or a switch to another company on the part of the applicant and by guaranteeing reimbursement for medical and investigation expenses.

Furthermore, as was declared in the *Ramson* case, *supra,* the coverage referred to in the cover note (receipt) should commence at the earliest possible time; and the inception of the risk should not be deferred by conditions subsequent. Applicant's request in the case at bar to "date policy Jan. 1, 1953" can be construed as a condition subsequent to the commencement of insurance coverage on December 11, 1952. The *Ransom* case in effect so holds. Referring to the cover note the court in the *Ransom* case quoted from *Gaunt v. John Hancock Mutual Life Ins. Co., supra,* stating that the provision in the policy that the insurance shall be in force from the date of application if the premium is paid gives rise to a contract of insurance immediately upon receipt of the application and payment of the premium; that the application must be construed as to be taken by the ordinary applicant and that such person would assume he was covered from the date of the application or the date of a medical examination if such be required and that he would be getting something for his money.

In the case at bar it is apparent that the appellee's agent received and the company retained a premium for which no coverage was afforded if the construction for which appellee contends be upheld:

> "There is an obvious advantage to the company in obtaining payment of the premium when the application is made, and it would be unconscionable to permit the company, after using language to induce payment of premium at that time, to escape the obligation which an ordinary applicant would reasonably believe had been undertaken by the insurer."
>
> *Ransom v. Penn Mutual Life Ins. Co., supra,* p. 425.

The *Narver* case is the leading case involving the cover note (receipt) and the suicide clause. It was therein held that the cover note and the subsequently issued policy must be construed together as a single contract of insurance; that any doubts as to when the suicide exclusion period began to run should be resolved against the exception of risk and in favor of the beneficiary under the policy.

See also:

Fox v. New York Life Ins. Co., 211 Ill. App. 406;

Jefferson Standard Life Ins. Co. v. Wilson (1919 5th CCA) 260 F. 593;

American National Ins. Co. v. Thompson (Tex. Ct. of Civ. Appeals 1916) 186 SW 254;

Krebs v. Philadelphia Life Ins. Co. (Pa. 1915) 249 Penn. 330, 95 A. 91;

Horwitz v. New York Life Ins. Co. (9th CCA 1935) 80 F. 2d 296;

Mutual Life Ins. Co. v. Hurni Packing Co. (1923); 263 U.S. 167, 68 L.Ed. 235, 44 S.Ct. 90.

In the last above cited case the court said (p. 175):

> "* * * having in mind the rule that in such cases the doubt must be resolved in the way most favorable to the insured. We conclude that the words refer not to the time of the actual execution of the policy or the time of its delivery but to the date of issue specified in the policy itself."

The court will note, however, that in the *Hurni* case it does not establish as a rule of law that "date of issue" means the date stated on the policy, but only that such date will be taken when there is a doubt, as the court said there was in the *Hurni* case, and such date is the *date most favorable to the insured.*

In the case of *Anderson v. Mutual Life Ins. Co.,* 164 Cal. 712, 716, 130 Pac. 726, the court said:

> "The day upon which, by the agreement of the parties, the risk attached, may be taken to be the day which was meant to be designated, in the clause under consideration '(suicide clause)' as that of the 'issuance' of the policy."

In the case at bar the risk clearly attached the date the applicant took and passed the physical examination, to-wit: December 11, 1952.

CONCLUSION.

It is respectfully submitted that the Transcript of Record and the authorities cited herein amply support appellant's right, either

(a) To summary judgment on her complaint for the amount prayed for, $12,400, with interest, or

(b) To have a jury pass upon any unresolved issues of fact.

If not clearly evidenced by the Transcript of Record, these questions would be presented:

1. Did the insured, Lloyd, intend to relinquish his right to have life insurance coverage commence December 11, 1952, date of medical examination, by requesting the policy be dated January 1, 1953, when at the time of making application therefor (December 6, 1952) he paid a full month's premium?

2. Did he relinquish such right only because he requested a future dating of the policy?

3. What conceivable consideration did he get for the "full month's premium of $12.57" demanded of him by appellee's agent if the acknowledgment of receipt therefor in the application incorporated in the policy did not afford interim coverage pending the issuance and delivery of the policy?

Dated, October 18, 1956.

Respectfully submitted,

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